

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

THOMSON REUTERS ENTERPRISE CENTRE  
GMBH and WEST PUBLISHING CORPORATION, : CIVIL ACTION  
:  
Plaintiffs, :  
v :  
:  
ROSS INTELLIGENCE INC., :  
:  
Defendant. : NO. 20-613-LPS

Wilmington, Delaware  
Friday, October 30, 2020  
*Telephonic Argument*

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

APPEARANCES:

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and

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23 P R O C E E D I N G S

24 (REPORTER'S NOTE: The following telephonic  
25 argument was held remotely, beginning at 11:04 a.m.)

1 THE COURT: Good morning, everybody. This is  
2 Judge Stark. Who is there for the plaintiff, please?

3 MR. BLUMENFELD: Good morning, Your Honor. It's  
4 Jack Blumenfeld from Morris Nichols for the plaintiffs.  
5 Also on for the plaintiffs are Dale Cendali and Joshua  
6 Simmons from Kirk & Ellis. And from Thomson Reuters,  
7 Carolyn Blankenship and Jeanpierre Guiliano. And with Your  
8 Honor's permission, Mr. Cendali and Mr. Simmons are going to  
9 split the argument today.

10 THE COURT: Okay. That's fine.

11 Good morning to you all.

12 And who is there for the defendant, please.

13 MS. O'BYRNE: Good morning, Your Honor.  
14 Stephanie O'Byrne along with Dave Moore from Potter Anderson  
15 & Corroon for defendant ROSS Intelligence. I'm joined by  
16 co-counsel from Crowell & Moring, Gabe Ramsey, who, with the  
17 Court's permission, will be arguing for defendants this  
18 morning. Also in attendance from Crowell & Moring, we have  
19 Mark Klapow, Kayvan Ghaffari, Josh Rychlinski, and Jacob  
20 Canter. And from ROSS Intelligence Inc. we have several  
21 client representatives of the client as well: Andrew  
22 Arruda, who is the CEO of ROSS, Jimoh Ovbiagele, who is the  
23 CTO of ROSS, and Maya Bielinski, who is in-house counsel for  
24 ROSS.

25 Thank you, Your Honor.

1                   THE COURT: Thank you. And good morning to all  
2 of you as well.

3                   I do have a court reporter on the line taking  
4 everything down, so I will note for the record that it is  
5 our case of Thomson Reuters Enterprise Centre and West  
6 Publishing Corp. versus ROSS Intelligence, Inc., our Civil  
7 Action No. 20-613-LPS.

8                   This is the time we set to hear argument on the  
9 defendant's motion to dismiss the complaint. So we will  
10 hear from the defendant first. And I believe Mr. Ramsey.  
11 You may proceed when you are ready.

12                  MR. RAMSEY: Very good. Thank you, Your Honor;  
13 and good day. I'd like to reserve 10 minutes for rebuttal  
14 so I'll attempt to frame our discussion accordingly.

15                  THE COURT: Okay. I'll let you know when there  
16 are 10 minutes left.

17                  MR. RAMSEY: Much appreciated. Thank you, Your  
18 Honor.

19                  Your Honor, there is a single overarching  
20 problem across the board with the respect to the plaintiffs'  
21 claims in its complaint. There is no direct fact, no  
22 plausible inference from any factual alleged material of any  
23 copying by either ROSS or third-party LegalEase, and there  
24 is no direct fact or any plausible inference from any  
25 alleged fact that ROSS had knowledge or intent or any

1 control with respect to any alleged activities of LegalEase.  
2 The claims fail to state a claim for these reasons across  
3 the board. In other words, plaintiffs have failed to plead  
4 enough facts to state a claim for relief that is plausible  
5 on its face as *Twombly* requires. There is only guesswork,  
6 speculation, and unwarranted inference.

7 First, plaintiffs do not allege any plausible  
8 fact of any actual material copied by ROSS into any of its  
9 material or its system.

10 So just first off the bat, any of the materials  
11 returned by ROSS's system, it is undisputed, do not contain  
12 the alleged key numbers or headnotes, which it's less even  
13 for purposes of arguing assuming that those things are  
14 protectable.

15 In fact, in the briefs, it's not -- it appears  
16 that plaintiffs are conceding that the actual opinions  
17 returned by the system are not at issue. That is not where  
18 the allegations of copying exist, and the Court can take  
19 judicial notice of the opinions from the ROSS system  
20 attached to the complaint.

21 So then the question is, is there any plausible  
22 fact alleged directly -- a factual allegation from which it  
23 can be inferred that key numbers and headnotes from the  
24 Westlaw system are in ROSS's technology in some way?

25 And the answer is simply no. There is no place

1 in the complaint where there is a fact alleged or any fact  
2 from which it could be inferred that key numbers  
3 specifically and headnotes specifically are copied into any  
4 ROSS technology.

5 In fact, in paragraph 26 of the complaint,  
6 plaintiffs admit that ROSS users are able to search for  
7 relevant law, and I quote, "by posing a question in natural  
8 language as opposed to boolean terms or keywords."

9 This is the only characterization of plaintiffs  
10 of the accused technology in the system in the complaint,  
11 and it is clear that the characterization is that the system  
12 uses natural language. In other words, the language of the  
13 underlying judicial opinions, not a structured means of  
14 organization such as key numbers or headnotes or some other  
15 system like boolean constructors.

16 So the facts that are alleged suggest the  
17 opposite of copying of key numbers or headnotes or some  
18 structure or reading or understanding or searching for the  
19 law.

20 But more broadly, in the complaint there is only  
21 speculative allegations that somehow ROSS alleges we needed  
22 some "descriptions of content or means by which to organize  
23 that content.

24 But there is no factual content. These are just  
25 bare conclusory allegations that such a need without any

1 underlying factual content that ROSS actually had such a  
2 need or from which it could about entered that ROSS had such  
3 a need or that in response to such a need that ROSS actually  
4 copied key numbers and headnotes into its technology. There  
5 is no factual content.

6 THE COURT: Mr. Ramsey, yes, let me ask you a  
7 question on that.

8 MR. RAMSEY: Please.

9 THE COURT: If it was adequately alleged that  
10 ROSS copied the headnotes or key numbers in creating its  
11 system, even if it were not alleged that it did that copying  
12 on an ongoing basis, i.e., in the search results one might  
13 get back when using the ROSS system, would that potentially  
14 be a sufficient basis for a copyright infringement claim or  
15 are you suggesting they have to allege the latter, that is,  
16 on an ongoing basis a user will get back key numbers and  
17 headnotes?

18 MR. RAMSEY: Well, I believe that the -- to  
19 answer your question, if the plaintiff alleged facts from  
20 which it was directly established or could be reasonably  
21 inferred that ROSS had copied on one or more instances the  
22 key numbers and the headnotes and used those in the system,  
23 in developing the system, that may state a claim.

24 But that is, that is the defendant's point.  
25 This complaint does not state such a fact anywhere from

1       which it could even be inferred that the key numbers and the  
2       headnotes were somehow used in the engineering process.

3               So let me, for example, perhaps present it this  
4       way. There is nothing that, not even a fact from which it  
5       could be inferred that LegalEase downloaded headnotes and  
6       key numbers and put them on some medium, handed them off to  
7       ROSS and then -- or that there is any feature of ROSS's  
8       system from which it could be inferred that, yes, this is  
9       this type of architecture, this type of system in the key  
10      number system that headnotes somehow drove algorithm  
11      development. It is pure sheer speculation.

12             THE COURT: Well, do they really need to reach  
13      the level of that it drove your system or drove the  
14      development of your system? I mean they do allege that, and  
15      I recognize they're just allegations, but you acknowledge  
16      have to take them as true if they're not conclusory.

17             They allege that you all induced this third  
18      party to reproduce en masse large quantities of materials  
19      from Westlaw. Why is it not reasonable to infer from that  
20      that when those materials were accessed en masse, the  
21      keynotes and the headnotes were somehow employed?

22             MR. RAMSEY: So I think the requirements of the  
23      case *Frazier v. City of Philadelphia* answers that question.  
24      In order to sufficiently plead a copyright claim in the  
25      Third Circuit, it's necessary to allege both access and some

1 factual content from which copying can be inferred.

2 Here, all that is alleged as to LegalEase is  
3 that LegalEase access, and it's alleged that there was a  
4 large volume of the Westlaw system to search. In other  
5 words, that is all we know from the complaint. That is all  
6 that can be reasonably inferred is that LegalEase used the  
7 Westlaw system to find law.

8 There is not, in addition, as required by  
9 *Frazier* and other cases, any factual content from which  
10 it can be reasonably inferred that LegalEase has even  
11 downloaded key numbers and headnotes.

12 And by the way, even with respect to the  
13 allegation of access, there is no facts in the complaint to  
14 attach ROSS to that access.

15 But further, there is no factual content from  
16 which it could be inferred that it is actually downloading  
17 the headnotes and key numbers.

18 THE COURT: You say I can take judicial  
19 notice --

20 MR. RAMSEY: Or -- (inaudible, two people  
21 talking at once.)

22 THE COURT: Right. You say I can say judicial  
23 notice of how ROSS opinions appear when accessed. Can I  
24 take judicial notice of how Westlaw opinions appear when I  
25 download them or look at them?

1 MR. RAMSEY: I have no objection on behalf of  
2 ROSS, and would submit that these are very different, these  
3 are very different materials of Westlaw opinions. When one  
4 reviews it, has headnotes and key numbers.

5 THE COURT: Right. Well, I don't want to --

6 MR. RAMSEY: And ROSS will continue to --

7 THE COURT: I don't want to supply factual  
8 content. It happens to be, of course, I'm familiar with  
9 Westlaw, as I'm sure we all are. So this is a technology I  
10 have some familiarity with. That generally I would think  
11 would be irrelevant to the analysis, but if I could take  
12 judicial notice, when I look at a Westlaw opinion, it has  
13 headnotes and it has, you know, the key numbering system  
14 on it. I don't know how to not have that.

15 So why isn't it at least a plausible allegation,  
16 a reasonable inference that is LegalEase copied large en  
17 masse portions of the Westlaw database that at least on  
18 occasion say copied with it headnotes and key numbering and,  
19 therefore, you know, this element of the claim is adequately  
20 stated for this early stage of this case?

21 MR. RAMSEY: Well, I would again return to the  
22 complaint. There is no factual allegation that actually  
23 allows such an inference. All that is alleged is that  
24 LegalEase carried out "tons and tons of legal research." In  
25 other words, accessed the system. There is no plausible

1 fact that suggests any downloading of any key number or  
2 headnote in passing that to ROSS.

3 That's the point. There needs to be some  
4 factual content to suggest that there was actually some  
5 downloading of that material. And in this case, the chain  
6 of inferences breaks even farther beyond that. There  
7 would have to be a direct factual allegation or reasonable  
8 inference, in fact, that downloading of these particular  
9 pieces of content happened. They were handed to ROSS. That  
10 ROSS somehow, there is some reason to believe that is more  
11 than just the broad level, broad recitation of copyright  
12 infringement that those particular features were in ROSS's  
13 system.

14 And it's important to note, ROSS's system is  
15 publicly available. This is not the kind of case where the  
16 product couldn't be reverse engineered. There is no term  
17 of a contract that has been pointed to that would stop the  
18 plaintiffs from doing reverse engineering and investigating,  
19 looking into what goes into ROSS's system, looking at what  
20 comes out; how is conducting a real investigation, that  
21 would supply facts from which it could be inferred that,  
22 that headnotes and key numbers were in fact in the system;  
23 there is none of that.

24 You know, this is not a patent case, but I will  
25 note, many patent cases that come before this court, as Your

1 Honor knows, it is quite common to require claim charts and,  
2 you know, not every detail, of course, needs to be alleged.  
3 You don't have to prove your case up front. But there must,  
4 under the *Twombly* and *Iqbal* standards, must be some factual  
5 content to show that the intellectual property right was  
6 infringed, something to suggest that some specificity of  
7 an element of a claim is met in a patent case, for example.

8 And the same is true in a copyright case. There  
9 must be something about the ROSS's system other than the  
10 fact that it is a generally similar legal research system to  
11 Westlaw, something more specific than that to suggest that  
12 key numbers and headnotes are used in the architecture,  
13 which is just not so as it turns out. But there is nothing  
14 to suggest that in the complaint.

15 THE COURT: I thought you already told me,  
16 though, that even if it's not in the architecture, if  
17 it's not in the user interface, but the keynotes and head  
18 numbers were used in the development of the ROSS system,  
19 that could potentially state a claim for copyright  
20 infringement. Didn't we already agree on that?

21 MR. RAMSEY: We did, but there is no -- the  
22 point is there is no facts directly alleged or any fact from  
23 which it could be reasonably inferred.

24 THE COURT: And won't you agree that in the  
25 process, that development process, that is not public. That

1 is not something that the plaintiffs can know at this point  
2 on anything other than information and belief; right?

3 MR. RAMSEY: Ah. I disagree with that,  
4 respectfully, Your Honor. That is the point about reverse  
5 engineering.

6 If plaintiff is doing something more than -- we  
7 know this from the law. Plaintiff must plead something more  
8 specific than their product is like our product in terms of  
9 software, and that is all that is alleged here.

10 In order to get to the point where there is a  
11 reasonable inference that the key numbers and the headnotes  
12 are used in the product architecture, there must be some  
13 reverse engineering. This is a case where the plaintiff,  
14 again, could and should have investigated the way that the  
15 system worked, observed its features and come up with some  
16 feature and factual aspect of the ROSS system that would  
17 allow an inference that it is structured and operates in a  
18 way using key numbers or headnotes.

19 This is the kind of thing that not every piece  
20 could be, of course, known but something could be known  
21 about the way that the ROSS's system worked if plaintiff  
22 had a theory that was grounded in plausible factual  
23 allegations and not just conjecture.

24 That's the point, that if plaintiff wants to  
25 plead a plausible case that there is copying and use of

1 headnotes and key numbers in the architecture of ROSS's  
2 system, there is plenty of material, and they could have and  
3 should have analyzed, reverse engineered, investigated that  
4 system to come up with a plausible inference.

5 And the fact that they have been engaged with  
6 ROSS for many years and went through a whole litigation with  
7 LegalEase, the system is widely and publicly available,  
8 and there is absolutely no detail to suggest that, such a  
9 copying in the infrastructure, no investigation, the claim  
10 fails.

11 And so, again, there is no plausible fact  
12 directly or facts from which it could be inferred that  
13 this material was copied into ROSS's system or even that  
14 LegalEase downloaded any such material and handed it to  
15 ROSS. There needs to be more than broad generalities.

16 The case, *Levey v Brown Investment Group* makes  
17 it clear unsupported conclusion, unwarranted inferences are  
18 just not sufficient. And that is all that is alleged here  
19 on information and belief.

20 I'll note that the *Network Managing Solutions*  
21 case does make the point that where a product can be reverse  
22 engineered, that is a requirement to get to the kind of  
23 facts that you would need to allege infringement.

24 And that's the case here, yet plaintiffs allege  
25 nothing of the sort. It's just, just a bare conclusory

1       assertion that the materials must be in there some way  
2       because the product functions in the same general technical  
3       space as Westlaw.

4               I'm going to move on to indirect infringement,  
5       Your Honor.

6               So beyond ROSS's content and products, there  
7       is also no plausibly alleged facts to support indirect  
8       infringement.

9               Nowhere in the complaint the plaintiff set  
10      forth any factual allegations at all that ROSS had any  
11      knowledge or intent to cause any reproduction, distribution  
12      or derivative works by LegalEase or that ROSS had any  
13      knowledge of any contract between LegalEase and West or  
14      knowledge that there was any exceeding the scope of such  
15      an agreement.

16              There is no factual allegations that ROSS knew  
17      of the terms of such an agreement between LegalEase and  
18      ROSS. All that is alleged is that ROSS at some point asked  
19      to use Westlaw, West said no, and that ROSS at some point in  
20      time hired LegalEase to carry out legal research. That is  
21      all that is alleged.

22              From such bare facts, it is simply not possible  
23      to infer that ROSS actually knew about specific terms of  
24      LegalEase's agreement with West or even that Westlaw use  
25      had anything to do with the relationship between ROSS and

1       LegalEase.

2                   It simply can't be inferred from the fact that  
3       ROSS was not able -- not permitted to use Westlaw at some  
4       point in time and that at another point in time engaged  
5       LegalEase to carry out legal research. And, again, that  
6       is all the plaintiffs allege with respect to ROSS's  
7       relationship with LegalEase. That ROSS engaged in legal  
8       research, nothing further than that.

9                   From that fact alone, it cannot be inferred,  
10       and it is certainly not directly alleged factually, that  
11       ROSS caused LegalEase to use Westlaw in the first place in  
12       general, that ROSS knew of the contract between LegalEase  
13       and Westlaw.

14                   During the briefing, a very general contract  
15       was attached, I believe that should be disregarded, but  
16       nonetheless, even that contract, there is no way to know if  
17       that has any bearing on ROSS or LegalEase. They simply have  
18       not established there is a particular LegalEase contract  
19       with terms that were violated, much less that ROSS knew  
20       about that. So, again, it's a similar sort of failing as to  
21       the direct infringement claims.

22                   THE COURT: It is further alleged that the basis  
23       on which ROSS was denied access to Westlaw was that West  
24       does not give competitors access to its products. I think  
25       it's at least a reasonable inference that LegalEase is not a

1 competitor of Westlaw. And why doesn't it follow from all  
2 of that that it's reasonable to infer that ROSS understood  
3 they would have to go through some sort of third party, some  
4 sort of subterfuge in order to get the Westlaw materials  
5 that they knew they could not get directly?

6 MR. RAMSEY: Well, there is no -- again, back to  
7 the pleadings standards, there is no facts alleged that ROSS  
8 did anything except in general hired LegalEase to carry out  
9 legal research. There is nothing wrongful about, you know,  
10 negative that can be inferred from hiring a party to carry  
11 out legal research, whether one is a competitor or not.

12 There is no facts even alleged that ROSS even  
13 knew LegalEase was going to use Westlaw as opposed to the  
14 Google search or Lexis or PACER or PacerPro or any of the  
15 other tools that are readily available in the world to find  
16 the law. That's the failing.

17 And there is also no allegation that ROSS  
18 actually knew of any provision in LegalEase's contract, one  
19 way or the other. All that is alleged is that ROSS went to  
20 a third-party legal research provider and asked for legal  
21 research. And that, that is simply not enough to get to  
22 the inference that ROSS, and both -- this covers the  
23 terrain both for indirect and copyright infringement and  
24 for tortious interference. That ROSS knew of the terms of  
25 a contract, intended to induce its breach for purposes of

1 tortious interference or for purposes of indirect copyright,  
2 infringement knew that whatever LegalEase was doing exceeded  
3 the scope of any license or violated terms.

4 There is just no -- ROSS simply didn't know  
5 about the contract, didn't know what LegalEase was doing.  
6 This was from the face of the complaint. The complaint is  
7 silent about those things.

8 So it simply can't be inferred that ROSS  
9 intended or knew or induced or contributed to copying any  
10 particular material or use of Westlaw even in general.

11 So, again, it's the same failing that -- it's  
12 a huge chain of leaps between the simple fact that ROSS is  
13 alleged to have engaged LegalEase to carry out legal  
14 research and many, many steps beyond that where the chain  
15 of inferences breaks both for purposes of copyright  
16 infringement and for purposes of tortious interference.

17 So further complicating matters, to complete a  
18 plausible copyright claim, it's not just enough to allege  
19 that copying happened, there has to be some allegation that  
20 copying of copyrightable elements were undertaken by the  
21 defendant.

22 Here, there is simply none of that. Again, it's  
23 just a general allegation that ROSS engaged LegalEase to  
24 carry out legal research and that somehow, not stated and no  
25 facts in any sort of reasonable chain from which it could be

1       inferred, that protectable, protectable material was  
2       actually copied into ROSS's system or the protectable  
3       material was downloaded by LegalEase.

4               Also note from the face of the complaint, the  
5       key number system and the headnotes themselves are not  
6       copyrightable.

7               We don't need to decide everything related to  
8       copyrightability of headnotes or key number systems or  
9       discussion related to the law or material related to the  
10      law, we just need to look at the pleadings.

11              So very briefly, the headnotes are just  
12      recitation of legal rules and legal concepts taken from  
13      judicial preponderances.

14              One of the examples given is a direct quote from  
15      two Supreme Court cases. That can't be protectable. It is  
16      a judicial edict.

17              The second example of headnote states in  
18      plaintiff's own assertions the key concepts. Those are  
19      plaintiff's words in the case.

20              That is not a creative -- stating the key  
21      concepts in a case is not a creative, expressive gesture.

22              And for those reasons, the offered headnotes are  
23      not copyrightable.

24              The key number system is just an alphabetically  
25      ordered list of legal topics.

1           The examples provided in the complaint -- these  
2           are plaintiff's examples -- are discussion of a legal topic  
3           in general. The nature and the elements, intent, acts and  
4           omission, these are basic building blocks of the law, these  
5           are not creative expressions; and therefore the key number  
6           itself is, as alleged in the complaint, is not creative in  
7           nature because they're just the general ideas of law that  
8           any lawyer would pick up and talk about.

9           Talk about the topic of law in general, talk  
10          about the topic of law and its nature and elements. That is  
11          a requirement of legal rules. Intent, this is mens rea.  
12          Acts and omissions act as reas. Basic legal building blocks  
13          that do not express anything in terms of communicating to an  
14          audience in which the copyright law anticipates.

15          And to provide a copyright on articulation that  
16          there is an ordered alphabetical list of legal topics and  
17          claiming a monopoly on identifying those, those topics in  
18          general, their nature and elements, their intent, the acts  
19          and omissions required would provide an monopoly under the  
20          law, and that is a dangerous proposition.

21                 So with that, I will move on to --

22                 THE COURT: Well, before you move on. The  
23                 arguments about whether there is any plausible allegation  
24                 of something protectable by copyright, why are those not  
25                 viewed as affirmative defenses and therefore a premature

1 basis for me to grant dismissal?

2 MR. RAMSEY: Well, so under the pleadings  
3 standard, it's clear that plaintiff -- again, plaintiff has  
4 to allege copying of copyrightable material. So we're not  
5 asking to rule on, pass on the entirety of the defense.

6 But at the same time, under the pleading rule,  
7 so a good case is *Riordan vs. H.G. Heinz* in the Western  
8 District of Pennsylvania. In that case, the plaintiff posed  
9 material in the complaint that the Court found on its face  
10 was an unprotectable idea.

11 So we're asking that the Court pass in the same  
12 way here. To look at the material in the complaint, the  
13 ordered alphabetical list of legal topics, the particular  
14 list of elements that are alleged to constitute this key  
15 number system, which, by the way, is an unprotectable system,  
16 plaintiffs even call it that, and the two headnote examples,  
17 and simply pass on the face of the pleadings; much like in  
18 the *Riordan* case, that the material posed and alleged is, on  
19 the face of the complaint, not protectable.

20 So this was part of the pleading standard that  
21 if what is put forward by a plaintiff in a copyright case  
22 is not facially protectable is an appropriate, appropriate  
23 question for the Court to pass on on a Rule 12(b)(6) motion.

24 THE COURT: How do I factor into all of that  
25 the allegations about the registration with the copyright

1 office?

2 MR. RAMSEY: Again, this ties back to the  
3 pleadings standards under Rule 12(b)(6). It is true that a  
4 very large number and massive body of materials are claimed  
5 in the voluminous copyright registrations that are attached.  
6 And the cases that were cited in the defendant's brief make  
7 clear that a plaintiff can't just point to a massive body of  
8 material across many, many registrations and assert there is  
9 copying of some protectable material out of this massive  
10 body of material, and that is what is happening here.

11 And so then when one -- and the Court must  
12 pass and look at the complaint and know exactly what is  
13 alleged. And when we do that here, we see, of the material  
14 that may or may not be protectable under these very broad  
15 registrations, that which is in the complaint is simply not  
16 on its face. And we don't -- this stage, you know, will  
17 pass further than that.

18 But the case, this is the reason for the  
19 pleadings standard that requires that a plaintiff not just  
20 plead copying in a very general way but copying protectable  
21 elements. Copyright registrations may cover broad swaths  
22 of material such as here, that includes some protectable,  
23 some unprotectable material. And hence, it's all the more  
24 important that the plaintiffs specify something that is  
25 actually protectable and something that is protectable that

1       was actually copied.

2               Back to the initial conversation. Here, there  
3       is no suggestion that the key numbers or the headnotes  
4       themselves are in any ROSS system. There is no fact that  
5       those allegedly protectable material, even assuming they  
6       were, were copied.

7               So it's, again, just a large chain of inference  
8       from an active LegalEase to download material which it's not  
9       even, it's not even shown any material was downloaded, much  
10      less something that is protectable. That such protectable  
11      material was -- there is nothing to infer it was handed to  
12      ROSS at all. The complaint is absolutely silent that such  
13      material was then put into the hands of engineers at ROSS,  
14      and there is some rational reason from the facts to infer  
15      that material drove a particular architecture in a ROSS  
16      product.

17              The entire chain of inference breaks down. And  
18      it is both in terms of copying in general and in terms of  
19      copying protectable elements.

20              THE COURT: Doesn't the registration create at  
21      least a presumption that there is something protectable  
22      within Westlaw?

23              MR. RAMSEY: I concede that in general that is  
24      true. But that broad -- again, we're not litigating the  
25      entire case here. I agree and concede that in general that

1 is a proposition of law about copyright registrations.

2 But, again, under the pleadings rules, the  
3 Court must look at the complaint itself and say what of  
4 that material was plaintiff actually alleging. That is  
5 what we're passing under Rule 12(b)(6) and nothing more.

6 The defendant submitted in this case the two  
7 examples of headnotes and the system, the system under  
8 102(b) of the Copyright Act that is not protectable, and its  
9 constituent elements. This alphabetical list of topics and  
10 the most fundamental "key concepts" of each of those topics.

11 This is the way plaintiff chose to plead their  
12 complaint. Plaintiff unfortunately, from defendant's  
13 position, have chosen material out of whatever might be  
14 copyrightable in a copyright, within a copyright registration.  
15 Plaintiffs have chosen material in the complaint that doesn't  
16 meet that bar.

17 THE COURT: They suggest at least in their  
18 briefing that they think they have something protectable  
19 in what they call the compilation, at which I think they  
20 mean the entirety of Westlaw and how they put it together  
21 in total.

22 Might that be a further plausible allegation  
23 here?

24 MR. RAMSEY: Well, first of all, that is not  
25 alleged in the complaint. What is alleged in the complaint

1 is only two, two headnotes. In other words, what is  
2 alleged is representative of the material that is allegedly  
3 copyrighted. Two headnotes and an alphabetical list of  
4 legal topics and key concepts ordered within those legal  
5 topics that are very, very basic fundamental principles of  
6 law, the ways of lawyers thinking about the law.

7 So there is no allegation of a compilation  
8 that was -- and certainly not one that was copied by ROSS.  
9 Again, back to the failure of alleging copying.

10 There is nothing to even get to copying of a  
11 single headnote by ROSS or a single portion of this key  
12 number system by ROSS, much less something that could be  
13 characterized as a compilation.

14 THE COURT: Do you oppose me giving them leave  
15 to file an amended complaint?

16 MR. RAMSEY: Well, I'll put it this way, Your  
17 Honor. At this point, given that plaintiffs have had access  
18 to ROSS's system to investigate -- it's freely available.  
19 They could look at what comes in, look at what comes out,  
20 conduct a reasonable investigation, and given the long  
21 multiple year history and thousands of documents and  
22 engagement with ROSS, we believe it would be futile, but if  
23 the Court sees it differently, there would be no opposition,  
24 of course.

25 THE COURT: All right. Did you want to talk a

1 little bit about statute of limitations?

2 MR. RAMSEY: So unless Your Honor has questions,  
3 I think I will just -- I only have got about five minutes  
4 here -- rest on the papers for purposes of statute of  
5 limitations just in the interest of time, and instead spend  
6 time focused on the failure to plausibly allege tortious  
7 interference.

8 I point Your Honor to a couple of cases under  
9 the *Travel Syndications Technology* case in Delaware and  
10 *Pacific Gas & Electric vs. Bear Stearns* case in California.

11 Regardless of which law applies, it's clear to  
12 plead tortious interference it's necessary to plausibly  
13 plead both knowledge of the contract and an intention to  
14 bring about its breach. Those are the two requirements.

15 And it's, I think it is encapsulated in the  
16 indirect infringement that the concepts are very related and  
17 the failures are very related.

18 Here, the plaintiffs allege no, no fact from  
19 which it can be inferred or directly established that ROSS  
20 knew anything about LegalEase's contract, only that  
21 LegalEase was a legal research company. So plaintiffs  
22 failed to allege the knowledge of the contract and they  
23 alleged no act by ROSS to carry out, to bring about any  
24 breach of such contract or any particular term.

25 Again, the complaint, as to ROSS's relationship

1 with LegalEase, the only facts in the complaint are that  
2 ROSS hired LegalEase to carry out tons and tons of Federal  
3 Defender legal research. Carrying out legal research in  
4 the United States is not a suggestion of any, any untoward  
5 conduct. It's simply not enough to get to the elements of  
6 any of the claims in the complaint.

7 And I believe I'm at my time.

8 THE COURT: We've got you at 12 minutes left,  
9 so I don't know if you have more you wanted to say at this  
10 point.

11 MR. RAMSEY: Well, I think that covers it in  
12 terms of tortious interference. Since I've got a couple of  
13 minutes by your watch, I will note that under the statute of  
14 limitations issue, the only salient factual material alleged  
15 in the complaint is that ROSS is in California and that  
16 the alleged acts were carried out by ROSS which is in  
17 California, and this is quite important in determining which  
18 law applies.

19 Under the barring statute, since all of the  
20 actors are foreign plaintiffs, the statute of limitations  
21 where the claim arose is a question. Here, the claim arose  
22 in California, and the question is which state has the most  
23 significant relationship of the dispute, and that is under  
24 Section 145 of the Restatement of Conflicts of Law. Here,  
25 it's in California where the activity happened. It's where

1 ROSS is domiciled. It is where the injury took place. That  
2 is a really important one.

3 Really, plaintiffs only response to substantial  
4 relationship is to mention that West Publishing is located  
5 in Minnesota. Really no more elaboration than that. It  
6 fails to mention the other plaintiff is based in Switzerland.

7 And it's clear in the *Ubiquitel* case, that where  
8 the injury could have occurred is in multiple ways. "The  
9 particular weight" -- those are the words of the case --  
10 "should be placed on the place causing the alleged injury."  
11 Here, allegedly ROSS's activities in California. So the  
12 California statute applies.

13 And as to the substance, the statute has run,  
14 because under California law, the statute of limitation runs  
15 no later, accrues no later than the breach itself, the  
16 underlying breach itself.

17 And here the complaint, the plaintiffs allege  
18 that as of July 2017, as early as that, there was awareness  
19 that LegalEase was working with this machine learning  
20 company. It's clear from the complaint it can be inferred  
21 an investigation was ongoing for years because by January  
22 2018, LegalEase's contract was terminated, and we know there  
23 was inquiry as to ROSS in that case. Plaintiffs simply knew  
24 and waited too long.

25 THE COURT: How could I resolve a discovery rule

1 issue under California law on this motion to dismiss against  
2 the plaintiffs? Aren't they entitled to the reasonable  
3 inferences there?

4 MR. RAMSEY: Well, again, the only allegation  
5 in the complaint as to when they knew is an assertion that  
6 in July 2017, there was awareness that this legal research  
7 company was carrying out acts on behalf of -- they were  
8 carrying out acts -- apologies, LegalEase was carrying out  
9 acts in July of 2017 on behalf of this legal research  
10 company. And it can also be inferred from the allegations  
11 in the complaint there was inquiry and attention to that  
12 issue, and by January 2018, plaintiffs knew.

13 So based on the complaint --

14 THE COURT: Sure. Sure. Yes. If plaintiff  
15 wants to say it's reasonable to infer that that machine  
16 learning company was known to be ROSS and we knew that by  
17 January 2018, that seems like a reasonable inference I would  
18 have to credit, but at the same time if the plaintiff wants  
19 to say that it is also reasonable to infer we did not know  
20 the identity of ROSS until within two years of when we filed  
21 this complaint, that seems like a reasonable inference at  
22 this stage of the case and further seems like something --  
23 I'm not sure if you have cited any California cases that  
24 says I should go ahead and decide that issue against the  
25 plaintiff at this stage.

1                   Why isn't the answer to all of this even if you  
2                   are right about California law, at best for you I have to  
3                   defer deciding the statute of limitations issue?

4                   MR. RAMSEY: Right. Well, I have not cited such  
5                   a case, but I will point out the plaintiffs never actually  
6                   state when they discovered the alleged tortious interference.  
7                   So --

8                   THE COURT: Right, but have you cited a case --  
9                   sorry. Have you cited a case because they have to do that  
10                  in order to survive a motion to dismiss?

11                  MR. RAMSEY: We have not, Your Honor. We have  
12                  not. But, although I think that *Endo-Surgery* says -- this  
13                  is 35 Cal.4th 797 -- that "plaintiff's attempt to hide  
14                  behind California's discovery rule is unavailing because  
15                  that rule applies that requires that plaintiffs specifically  
16                  plead the time and manner of discovery and the inability to  
17                  have made earlier discovery despite reasonable due  
18                  diligence."

19                  So there is some obligation under California  
20                  in this *Endo-Surgery*, 35 Cal.4th 797. There is California  
21                  law that there needs to be some allegation in the complaint  
22                  about when plaintiffs discovered or not discovered the  
23                  alleged tortious conduct for breach.

24                  THE COURT: All right.

25                  MR. RAMSEY: And again, that silence matters.

1 But again, the Court need not pause only on the statute of  
2 limitations. The claim is insufficiently plead in general  
3 as discussed.

4 THE COURT: Okay. Let's save the rest of your  
5 time for rebuttal, and we'll turn it off to plaintiff.

6 MS. CENDALI: Thank you, Your Honor. This is  
7 Dale Cendali from Kirkland on behalf of the plaintiffs.

8 ROSS's argument and briefs fundamentally  
9 misunderstand the applicable pleading requirements, the  
10 nature of this case, and key facts.

11 Starting with a pleading requirements. I think  
12 Your Honor summed them up well in the *CAE vs. Gulfstream*  
13 case which stated that, "A motion to dismiss may only be  
14 granted if, after accepting all well-pleaded allegations  
15 in the complaint as true and viewing them in the light  
16 most favorable to plaintiff, plaintiff is not entitled to  
17 relief."

18 In fact, this Court elaborated, citing Third  
19 Circuit law in *Wilkerson*, that, "The complaint must state  
20 enough facts to raise a reasonable expectation that  
21 discovery will reveal evidence of each necessary element of  
22 each plaintiff's claim."

23 This standard has been more than met by the  
24 detailed complaint before the Court.

25 Now, the second issue, moving beyond the

1 misapprehension about the pleading requirements or at least  
2 the threshold one, is the nature of the case. As I think  
3 Your Honor's request made clear, we're not -- this complaint  
4 is about accusing ROSS of surreptitiously, when they were  
5 rejected by themselves to do it, getting LegalEase to obtain  
6 Westlaw content and use that to create a competing platform.

7 That is right in their paragraph 35. "Upon  
8 information and belief, after LegalEase copied the Westlaw  
9 content, it distributed that content to ROSS. ROSS then  
10 copied that content and used it to create its platform."

11 That is replete throughout the entire complaint.

12 Yes, it may be that what ROSS is actually also  
13 making available to its consumers after the creation might  
14 also infringe, but what this complaint is focusing on now is  
15 what it did to create the platform to begin with. And that  
16 is clear in the complaint.

17 It's also clear, as I think again Your Honor  
18 apprehends from its, the Court's questions that we're not in  
19 a position to be sitting there with ROSS's engineers and to  
20 know exactly what they did once they succeeded in their goal  
21 of obtaining the content that it paid LegalEase to provide  
22 it. That is why that was pled on information and belief.  
23 That material is not publicly available.

24 But we have more than set forth, you know,  
25 plausible facts that said that they came, after being turned

1 down by West, they ran to LegalEase, that they knew that the  
2 contract that LegalEase had with us said that they were not  
3 entitled to give material to a competitor.

4 And, again, this is right in paragraph 3 of the  
5 complaint. "Upon information and belief, ROSS intentionally  
6 and knowingly induced a third party called LegalEase to  
7 breach its contract with West by engaging in unlawful  
8 reproduction of plaintiffs' uncopyrighted content and  
9 distributed that content en masse to ROSS. ROSS did so  
10 after asking for, and being explicitly being denied,  
11 access to Westlaw by West on the basis West does not give  
12 competitors access to its products. Thus, ROSS induced  
13 West -- LegalEase to engage in this unlawful activity  
14 knowing that it violated the terms of LegalEase's contract  
15 with West."

16 So at various times in my friend's argument,  
17 they argued that, well, there is nothing in there that, that  
18 is alleging that ROSS knew what LegalEase was doing or  
19 knowing that it had this contract or knowing what it meant.  
20 What we -- we pled exactly the opposite.

21 The other thing that I think is important is not  
22 only is it not publicly available, what ROSS's engineers  
23 did with the material it received en masse from LegalEase  
24 pursuant to its asking them to give it to them, but what is  
25 also not publicly available is what their actual interfaced

1 consumers look like.

2 At various time in counsel's argument, he  
3 said that, well, you know, the ROSS platform is publicly  
4 available. We should have somehow, you know, looked at it  
5 and reverse engineered it or something to that effect.

6 Leaving aside that there is zero requirement  
7 in copyright law to try to reverse, reverse engineer some  
8 public thing to try to figure out what was taken from you  
9 to create it, it's also important to note that prior to  
10 us filing this complaint, ROSS's terms of service had a  
11 provision explicitly prohibiting competitors from using its  
12 product.

13 Only after that we filed the complaint would  
14 that provision was tellingly removed. I don't think it  
15 really matters because the nature of this complaint, as I  
16 said earlier, isn't about the interface or at least at this  
17 point isn't about the interface because we haven't had  
18 access to what they're giving people.

19 What this complaint is about that they used  
20 Westlaw's copyrighted material to create a competing  
21 platform. To be able to get that fast development time and  
22 rush out a competing platform.

23 And to be clear, counsel also repeatedly kept  
24 talking about this case as if it were just about the Westlaw  
25 key numbering system or the headnotes.

1           No doubt those are material that or it's part of  
2           our copyright. But our copyright also is our registrations,  
3           1-1, pages 2 and 3 of our complaint indicate. And paragraph  
4           2 of our complaint also specifies, is that we also have a  
5           copyright in the compilation that we created. It's not just  
6           these, you know, standing on its own, headnotes but it's  
7           the entire structure, sequence, and organization that we put  
8           together to find, analyze, to explain the law.

9           And the complaint details all the myriad  
10          creative choices that went into creating that content. And  
11          we have not just one, not just two, but 161 copyright  
12          registrations attached to our complaint that all of which  
13          under Third Circuit law are entitled to a presumption not  
14          just of validity but also a presumption of originality.  
15          And that is more than enough to plead a claim of copyright  
16          infringement, which we have done.

17          Now this --

18          THE COURT: Ms. Cendali, let me ask you. So  
19          when you refer to compilation in the answering brief as  
20          something you are going to argue is protectable under  
21          copyright, that allegation is found in paragraph 2 when you  
22          refer to plaintiff's copyrighted content and organization?  
23          Is that what I should understand?

24          MS. CENDALI: That's right. That's the first  
25          time that it is mentioned. But throughout the complaint,

1 Your Honor, we also talk about, I think it starts in, it  
2 starts in paragraph 11 and it goes from there. It's also  
3 talked about in paragraph 12 which talks about plaintiff's  
4 numerous creative choices about how to organize cases, which  
5 cases to place in the classification, require substantial  
6 investments of time, technological resources, and money over  
7 the course of decades.

8 And then we go on. Paragraph 13 talks about  
9 plaintiffs' complex hierarchy, and what is done to make  
10 choices as to -- and when we all know that even Your Honor's  
11 decision in this case could be probably sliced and diced 100  
12 different ways or maybe not sliced and diced. Maybe it will  
13 only be sliced and diced in 60 ways or 200 ways and all  
14 sorts of keynotes and headnotes can be created.

15 And as we plead in the complaint in detail, we  
16 took the time to talk about this is all part of our  
17 creativity. Paragraph 15 as well talks about how Westlaw  
18 includes access to volumes of proprietary material,  
19 including such as West headnotes, case summaries, and other  
20 Westlaw created content, databases, compilations of case  
21 law, et cetera. All of that was pled in our complaint.

22 And they copied it en masse. This isn't just  
23 about the headnotes. That's not what we, what we pled, and  
24 that is not what our copyright registrations are limited to.

25 In fact, as I was, I was saying, you know, if

1 Your Honor looks at the copyright registrations annexed to  
2 the complaint, such as Docket 1-1, page 2, it's the author  
3 of compilation, revisions, addition, et cetera.

4 And that is also true with regard to 1-1, page  
5 3, compilation of previously published case reports,  
6 including, but not limited to, opinions and also syllabi in  
7 Westlaw paragraphs.

8 Westlaw is much more than the headnotes and  
9 keynotes, and it is certainly much more than the one or two  
10 headnotes or keynotes that we put in the complaint, just to  
11 give Your Honor an idea of the story.

12 We certainly were not saying that is the only  
13 thing that we are suing on, and I don't think that is a fair  
14 reading of the complaint. Rather, we're suing on all of  
15 Westlaw, all of our proprietary material which includes our  
16 revisions, our compilations, our additions, our analysis,  
17 and the hierarchy that we detail at length in our complaint.  
18 And that is more than enough.

19 THE COURT: All right. But what you do in the  
20 complaint also at paragraph 1 is create a defined term,  
21 "Westlaw content." And I think by your own concession, but  
22 I want to make sure I got this correctly, Westlaw content  
23 is a term that also encompasses things that you do not  
24 contend you have a copyright on. For instance, judicial  
25 opinions and statutes.

1           So I think some of the confusion here and  
2           some of the argument that you are facing is you don't say  
3           compilation as a defined term in the complaint, although  
4           you suggested it in your belief. And you don't really make  
5           clear in your complaint your acknowledgment that some of  
6           what you are defining as Westlaw content is actually not  
7           protectable. So help me with that.

8           MS. CENDALI: I'm happy to, Your Honor. What we  
9           intended to do and said in paragraph 1 of the complaint is  
10          that, "Plaintiffs created and nurtured their well-known  
11          Westlaw products since inception, including, without  
12          limitation, its unique West key number system and West  
13          headnotes."

14          And to be clear, the West key number system (A),  
15          it's without limitation, as I point out in the definition of  
16          Westlaw content. But the West key number system, which we  
17          explained at length in those paragraphs that I referred Your  
18          Honor to a few minutes ago with regard to the hierarchy,  
19          that is all of the compilation, the creative structure, and  
20          organization of Westlaw.

21          We talk about and repeated paragraphs in this  
22          complaint about how they took our structure, sequence, and  
23          organization. For example, we say on paragraph 11, "Westlaw  
24          makes legal research seamless through its well designed  
25          structure, sequence, and organization."

1           And our point is, well, we don't know, since  
2           we're not inside their company, exactly what they took but  
3           they took all of our content. And to make it also clear, I  
4           realize I didn't completely answer your question, we did  
5           not define and did not intend to define Westlaw content as  
6           relating to unprotected materials.

7           The copyright registrations in fact are clear  
8           on that. The copyright registrations state on their face,  
9           and this is annexed to the complaint in Docket 1-1, page 3  
10          as well, that copyright is not claimed as to any part of the  
11          original work prepared by United States Government officer  
12          or employee as part of that person's official duties.

13          That material would not be included in the  
14          definition of Westlaw content. It couldn't be because it's  
15          not part of our copyright registrations. Rather --

16          THE COURT: Yes. Where does your complaint make  
17          that clear and give the defendant notice of that?

18          MS. CENDALI: Well, I think it makes it clear  
19          by defining Westlaw content for, for what it is, which is  
20          its unique West key number system and the West headnotes,  
21          without limitation. And I think it also makes it clear  
22          because we attached 161 copyright registrations to the  
23          complaint that disclaimed that material. We are not  
24          claiming copyright on that.

25          THE COURT: How about the search engines and

1 algorithms? Are you claiming copyright protection on those?

2 MS. CENDALI: Yes, the search engines and  
3 algorithms are part -- they're part of the compilation.  
4 They're part of the hierarchy and the structure of how  
5 Westlaw is created and operates. And that is definitely  
6 part of our, of our copyright claim, and part of our  
7 registration.

8 THE COURT: And how does your complaint give  
9 reasonable and adequate notice to the defendants that that  
10 is part of what they are alleged and have to defend against?

11 MS. CENDALI: Well, if Your Honor doesn't think  
12 it gives reasonable notice, then, you know, we submit we  
13 would be happy to amend to say that. But I think that we  
14 did our best. I hope we succeeded, but we did our best to  
15 say that, such as on paragraph 11, editorial enhancements  
16 such as West proprietary headnotes, notes of decisions,  
17 and the WKNS are just a few examples of the creative and  
18 original material authored by West.

19 And then we spent a lot of time talking  
20 especially in paragraph 13, about the different hierarchy  
21 and structure that was created. And we annexed the  
22 copyright registration that was clear that it covers  
23 revisions, compilations and does not cover material created  
24 by people like yourself. That's what the registrations  
25 reflect, and that is what we thought we did in the

1 complaint.

2 But moving on, Your Honor to, if you permit, to  
3 so far we've just been talking about the claims of direct  
4 copyright infringement. Counsel also, in oral argument,  
5 talked about our secondary liability indirect claims.

6 And there, I think it's important to make a  
7 threshold point, which is that they have waived argument  
8 with regard to their secondary liability claim.

9 As Your Honor recently found on, just recently  
10 on October 8th of this year, in the *Align Tech* case,  
11 where you wrote that you would not evaluate the merits of  
12 something that wasn't raised in the opening brief, nowhere  
13 in their opening brief did they allege that they would be  
14 making arguments about the sufficiency of our indirect  
15 infringement claims.

16 Moving from there, counsel also talked about  
17 some argument with regard to copying of the constituents  
18 elements and the like. And I think it is important to  
19 remember that there is not any kind of requirement as they  
20 seem to suggest that we have to somehow parse through all  
21 of Westlaw to identify in detail issues with regard to it  
22 as they seem to want to do. Well, I don't know. You should  
23 be specific as to whether this is, this headnote you think  
24 is protectable or that headnote, you know, may be not be as  
25 good or something to that, to that effect.

1           Again, our copyright registrations are clear  
2           that the revisions, the compilation are ours and that the  
3           government works are not.

4           But I think that the *Micro Focus* case decided  
5           by Judge Andrews a few years ago is a very good case for  
6           today's discussion. Because there, the defendants, too, try  
7           to argue that, well, the plaintiff, in a software case, you  
8           know, failed to identify -- to break down and identify in  
9           their copyrighted software what original elements they  
10          believe were worthy of copyright protection.

11          And Judge Andrews dismissed this argument. He  
12          said, "The defendant's original element theory is not the  
13          correct standard. For purposes of Rule 12(b)(6), a  
14          complaint only needs to allege specific original works are  
15          the subject of a copyright claim. In the present case,  
16          plaintiffs identified the software as the original work in  
17          question, and this is sufficient to withstand a motion to  
18          dismiss."

19          Plaintiff also tried to tackle on this motion to  
20          dismiss the idea that the headnotes of the West key  
21          numbering system is somehow not protected by, by copyright.

22          Well, the first point is that is something that  
23          they can be free to address in discovery but isn't proper  
24          for a motion to dismiss because we have a presumption of  
25          validity and a presumption of originality. We have 161 of

1       them, and therefore it's an affirmative defense, as the  
2       *Masimo* case talked about, that Your Honor alluded to, for  
3       them to try to rebut that presumption.

4               And as the cases cited in our brief also state,  
5       that there is no pleading requirement to plead around an  
6       affirmative defense. There is no obligation to do that.

7               Moreover, I'll also say that the Eighth  
8       Circuit in the *West Publishing* case already found that there  
9       was a copyright in Westlaw's original expression in the  
10      compilation of its, of its material.

11              And I'll also point out that the Supreme  
12      Court recently in the *Georgia vs. Public Resources* case,  
13      specifically distinguished between materials that are  
14      created by officials empowered to speak with the force of  
15      law -- which sadly means, Your Honor, that your writings are  
16      not protectable by copyright, at least in your official  
17      capacity -- with works that are protectable that are created  
18      by private parties.

19              That distinction was in the majority opinion  
20      authored by Justice Roberts. And then Justice Ginsberg,  
21      in her dissent, before going into other areas, said, "all  
22      agree that headnotes in syllabi for judicial opinions --  
23      both a kind of annotation -- are copyrightable when created  
24      by a reporter of decisions."

25              The bottom line, Your Honor, is that we did our

1 best. You know, it's hard to put your entire case in a  
2 complaint. That is not what Rule 8 is about. But we  
3 tried our best to explain why plaintiffs did what they did,  
4 what their scheme was, how they were trying to get around  
5 the refusal by us to let them use Westlaw, to create a  
6 competitive platform. How they knew of that requirement,  
7 that limitation. That they went to LegalEase anyway to get  
8 it indirectly what they couldn't get directly. And that  
9 they used it to rush to market with a competing platform.

10 And that is what this case is about. We also  
11 believe that we plead that they took both directly and  
12 indirectly Westlaw content, which we intended to indicate,  
13 without limitation, was broad. And we attached the  
14 copyright registrations that reflected that which included  
15 the fact that related to the compilation, as we also said  
16 in paragraph 2, and that it did not relate, as the base of  
17 the registrations also say, to government works.

18 We did our best. We think that we more than  
19 satisfied the pleading requirements in Rule 8. And we  
20 respectfully request, Your Honor, that it's time now to  
21 start discovery so that both sides, we can further develop  
22 our affirmative claims, and ROSS is entitled to develop its  
23 defenses.

24 With that, unless there are more questions on  
25 the copyright aspect of it, I'd like to hand it over to

1 my partner, Josh Simmons, to talk about the tortious  
2 interference claims.

3 THE COURT: All right. Let me ask you a few  
4 more questions, and then we will turn it over to him.

5 If, just for the sake of argument, if I don't  
6 dismiss the case and I don't require you to amend, you have  
7 referenced in discovery what would you envision as the  
8 mechanism and how early might it be that you would give  
9 greater specificity to the defendant as to what you are  
10 contending is protectable under copyright within the subset  
11 of Westlaw content? And what it is you are alleging that  
12 they copied from that protectable content? How soon would  
13 they get more specific understandings of what this case is  
14 about there your perspective.

15 MS. CENDALI: Okay. Let me take it from two  
16 respects.

17 First, in terms of the protectable content, how  
18 it would -- was that I think your second question -- how  
19 would, more detail about what they took? I believe that is  
20 what you were asking, Your Honor.

21 THE COURT: It is really both sides of it. They  
22 have arguments that I need to evaluate that have you not  
23 been specific enough about what you contend is protectable  
24 content and, further, what you contend that they copied.

25 So they're telling me I should dismiss the case

1 or, at worse, make you replead. If I don't go with either  
2 of those options but I have concerns that they don't really  
3 have enough notice as to what you are alleging, how would  
4 you propose in a post-motion to dismiss world that you help  
5 alleviate those concerns?

6 MS. CENDALI: Okay. First, Your Honor, in terms  
7 of what they copied, they know better than we do as to what  
8 they copied. They know what they sent to LegalEase, they  
9 know what they asked LegalEase to get them. They know what  
10 they did with the materials they got from LegalEase.

11 At this stage, without discovery, we can't  
12 look behind the curtain and see what it was that they did,  
13 but they know better than we do as to what they took from  
14 Legal -- from LegalEase, what they copied to create the  
15 system.

16 But what happened is in discovery, we would  
17 no doubt be able to find out through discovery as to what  
18 communications with LegalEase, what they did with the  
19 materials that they got, and how their engineers used that  
20 material to create the system. That is something that we  
21 plead, and I don't know of a case that says we need to plead  
22 more than that.

23 We certainly don't need to replead, as Judge  
24 Andrews' opinion in *Micro Focus* has said, we don't need to  
25 parse through our 161 Westlaw registrations to further

1 identify what is protectable and what isn't because the  
2 fact of the matter is, everything that we registered has a  
3 presumption of validity. And what we registered was a  
4 compilation, the revisions, the headnotes, and we did not  
5 register and have a carveout for the government works, the  
6 cases themselves. That is already in there.

7 I don't know of a case that says you are  
8 supposed to do more than that. I know of cases such as  
9 *LegalEase* that says -- excuse me, such as the *Micro Focus*  
10 case that says that. Otherwise, similarly, Your Honor, in  
11 the *Vianix vs. Nuance Communications* case in the District of  
12 Delaware, the Court found that simply naming the technology  
13 that and providing the registrations relating to that is  
14 enough to satisfy the pleadings standard of Rule 8.

15 Now, as a practical matter, what will happen in  
16 discovery is they will know doubt attempt to try to argue,  
17 well, you have already heard some of that. Well, you know,  
18 we think that some of the things that your compilation or  
19 your, your headnote, you know, we don't like this headnote,  
20 we don't like that headnote. We're going to try to argue  
21 that some of those things aren't protectable.

22 That is part of their affirmative defense and  
23 part of their burden to rebut our presumption of validity  
24 that the Third Circuit, for example, in the *Ford Motor* case  
25 has made clear belongs to us.

1           And they're free to do that. They're free to  
2           have 30(b)(6) depositions of our people. They're free to,  
3           you know, to try to rake us over the coals as to, well, I  
4           don't know about this headnote, I don't know about that  
5           headnote.

6           Presumably, some of that will be less important  
7           depending on what they actually took. What we'll end up  
8           doing is no doubt focusing on the material that they  
9           ingested and how they used it as opposed to everything at  
10          Westlaw. There is not a lot of need to go over everything.  
11          Most likely, both sides will be focusing on what they  
12          actually used, and that will be a lot of the focus of the  
13          analysis.

14          But the point is right now, we've plead  
15          detailed -- we have, we have satisfied the two part test of  
16          *Feist*. We plead ownership of a valid copyright and 161  
17          registrations with their validity and presumption. They are  
18          free to rebut pit. And we also pled copying by them, both  
19          direct and, not challenged until their reply brief, indirect  
20          liability.

21          And we alleged that with specific facts. And  
22          counsel is just not correct in saying that we didn't have  
23          allegations in there that are specific as to their knowledge  
24          and as to their use. We did, and I think the complaint sets  
25          it out.

1           THE COURT: I do want to follow-up a little bit  
2 on that. Part of it, what they copied, why shouldn't I  
3 understand what you are telling me to be, hey, we're just  
4 completely speculating here that the defendant actually used  
5 some of our protected material. We really don't know, we  
6 just suspect they could not have developed their product  
7 so quickly if they didn't. But, you know, let us get to  
8 discovery and then we'll find out if our suspicions are  
9 correct.

10           Have you alleged anything more than that?

11           MS. CENDALI: Well, I think they have, Your  
12 Honor. I mean we alleged everything that we can since we  
13 can't, we can't go behind the scenes and look at exactly  
14 what their engineers are doing. That is why as Your Honor  
15 noted, information and belief is, is entirely appropriate  
16 in here because of their own conduct.

17           But I think, as you were suggesting, it is a  
18 more than plausible inference if you were denied access, as  
19 we pled, to Westlaw and then they hired LegalEase to copy  
20 our content, which we pled, and provided to them en masse, I  
21 think it's a reasonable, plausible inference that you should  
22 go our way that they used it. I mean why would they go  
23 through all this if they didn't use it?

24           I don't know what more I could even say on this,  
25 because they're the ones who have all that material. But

1       it's certainly a very plausible inference. And this  
2       happens. Again, I look at the *Vianix* case and other cases  
3       that we cited in the briefs, if someone took the material  
4       and you alleged plausibly, and they don't deny that they  
5       contracted with LegalEase to do this, of course, but they  
6       took the material from LegalEase. They may have LegalEase  
7       give them enormous material of material, which we pled.

8               It's reasonable to think that they did that for  
9       a reason and that they copied it. And there is nothing more  
10      I can know now because I have no access to their system.

11             THE COURT: All right. Thank you. You  
12      mentioned Judge Andrews' *Micro Focus* decision.

13             There, I think he sets out basically a four-part  
14      test to apply when there is a motion to dismiss in an  
15      infringement claim like this. Do you agree that that is a  
16      reasonable framework for me to follow?

17             MS. CENDALI: I actually think that that goes  
18      beyond the two-part test of the Supreme Court in *Feist*. So  
19      I'm not sure if the Supreme Court, to be honest with you,  
20      Your Honor, would necessarily agree with that.

21             That being said, the actual application of that  
22      test would fit this case because as I'm looking at Judge  
23      Andrews' decision -- and I note, by the way, that Judge  
24      Andrews' decision also cites, pardon the expression, the *Dam*  
25      *Things From Denmark vs. Russ Berrie* case, the Third

1 Circuit case that says that complaint has to assert two  
2 essential elements, ownership of copyright and copying by  
3 the defendant, done.

4 But then Judge Andrews goes beyond to say which  
5 specific original works of the subject of the copyright  
6 claim?

7 Well, here, the 161 Westlaw works.

8 Two, ownership of the copyrights of those works.

9 Well, that is owned by Thomson Reuters. We put  
10 that in there.

11 Three, registration of the works in question  
12 with the copyright office.

13 Check, also done.

14 And four, by what acts the defendant infringed  
15 the copyright.

16 And that, we also allege. We allege it on  
17 information and belief that they copied the material that  
18 they illicitly obtained from LegalEase to create their  
19 competing platform.

20 More than that, we would not be privy to at  
21 this point. But we detailed the volume of what was passed  
22 over. We detailed and discussed how, the information about  
23 the algorithms, and we think that that is enough at the  
24 pleadings stage to get us into discovery, which I circle  
25 back to where we started, Your Honor, which is, you know,

1 your point that the complaint must state enough facts to  
2 state a reasonable expectation that discovery will reveal  
3 elements of each necessary element of a plaintiffs claim.

4 THE COURT: Okay. Thank you. You have answered  
5 my questions.

6 There is about 10 minutes left for plaintiffs;  
7 and you can pass it off to your partner, if you wish.

8 MS. CENDALI: Thank you, Your Honor.

9 MR. SIMMONS: Good afternoon, Your Honor.  
10 This is Joshua Simmons. I'm going address the tortious  
11 interference claim.

12 To kind of a start where Mr. Cendali left off.  
13 Contrary to Mr. Ramsey's description, plaintiffs have  
14 alleged each element of their tortious interference claim.

15 As to the existence of a contract, no one  
16 disputes that LegalEase is alleged to have entered into a  
17 subscription agreement with West. And that is at paragraph  
18 29.

19 As to ROSS's knowledge of its subscriber  
20 agreement, plaintiffs allege that after ROSS requested and  
21 was denied access to Westlaw, as Your Honor then noted in  
22 your questions, ROSS hired LegalEase to acquire access to  
23 and copy plaintiffs' valuable content. That is paragraph 1.

24 And it did so because it "knew that LegalEase  
25 had a valid contract with West." That is paragraph 51.

1           As to intentionality, the whole complaint  
2 frankly is about ROSS's intent and the scheme between these  
3 two companies, but specifically ROSS is alleged to have  
4 instigated its scheme knowing that it violated the terms  
5 of LegalEase's contract with West. That is paragraph 3.

6           And thus when ROSS caused LegalEase reproduction  
7 and distribution, it's alleged to have done so knowing of  
8 the subscription agreement and that doing so would breach  
9 those terms. That is paragraph 3, also 28 through 29, 51  
10 through 52.

11           In fact, paragraph 51 specifically alleges that  
12 ROSS intentionally instructed LegalEase to act in breach of  
13 the contract.

14           As to the remaining claims, I don't think those  
15 are in dispute. Elements, I don't think they're in dispute  
16 at this point, you know, as to acting without justification.  
17 As we point out, the *Telluride* case makes clear, that is  
18 actually ROSS's burden and they can't show it was justified  
19 on a motion to dismiss, but in any case, we alleged that it  
20 was not justified in paragraphs 3, 30, 31 and 51. And that  
21 the damages, ROSS does not dispute paragraph 53 of the  
22 complaint and otherwise we discuss are harmed.

23           Under *Travel Syndication*, which was mentioned  
24 earlier, no more than an allegation that ROSS participated  
25 in the breach is required. And we have done far more than

1       that.

2               Moreover, under *Twombly*, our allegations are  
3       taken as true and viewed in the light most favorable to us;  
4       so, you know, it's simply wrong to suggest that we were  
5       required to do more at this stage given all of that, of that  
6       pleading.

7               THE COURT: Let me stop you there. Going back  
8       to, I think you cited paragraph 1. What was the portion  
9       of paragraph 1 that you think supports, if you were saying  
10      this, the allegation that ROSS knew LegalEase had a contract  
11      with West?

12              MR. SIMMONS: I think for that, I was citing  
13      paragraphs 1, 3, and 51. I think the best, I think the best  
14      of those quotations is on paragraph 51 which is where we  
15      write, "Upon information and belief, ROSS knew that  
16      LegalEase had a valid contract with West."

17              THE COURT: Do you see something helpful to you  
18      in paragraph 1 on this point?

19              MR. SIMMONS: Well, yes, I do in the sense  
20      that, you know, we also allege that ROSS explicitly and  
21      surreptitiously, after being denied permission, used  
22      essentially what is LegalEase to enact and obtain illegal  
23      content, and it did so to create the competing platform.

24              So in terms of knowledge of the contract, it  
25      knew that it was denied access. As Your Honor pointed out,

1 it was denied specifically because it was a competitor.

2 Turned around and hired another company.

3 And then when one would assume the reason they  
4 did that is they knew that they needed someone else to sort  
5 of use some subterfuge to get access to the material.

6 THE COURT: Okay. But where in that is there an  
7 allegation that ROSS knew that LegalEase had a contract and  
8 that what ROSS was asking LegalEase to do would be a breach  
9 of its contract with Westlaw? Where is that alleged in this  
10 complaint?

11 MR. SIMMONS: Sure. So, Your Honor, we alleged  
12 that in a couple different places.

13 Paragraph 3 I think is particularly helpful  
14 on this where it says, "ROSS intentionally and knowingly  
15 induced a third party called LegalEase to breach its  
16 contract with West by engaging in the unlawful reproduction  
17 of our copyrighted content and distribution of that content  
18 en masse to ROSS."

19 THE COURT: Well, why is that not just  
20 conclusory and parroting the elements of the tortious  
21 interference claim?

22 MR. SIMMONS: So I don't, I don't think it is  
23 conclusory because you have to -- because it would be --  
24 that is a statement that would be read in conjunction with  
25 the specific allegations of what LegalEase did the breaching

1 on, which is paragraphs 18 and 19.

2 And so the point here is that they knew --  
3 you know, there is multiple allegations of knowing of the  
4 contract. We talk about what those terms were and what  
5 LegalEase did and say they, you know, intended that  
6 LegalEase would breach them.

7 And under the, under the *Travel Syndications*  
8 case, that is what you need to plead at the motion to  
9 dismiss stage, particularly when all of the inferences have  
10 to be taken in favor of us.

11 THE COURT: All right. Did you want to talk  
12 about the statute of limitations?

13 MR. SIMMONS: Sure, Your Honor. In terms of  
14 statute of limitations --

15 MS. CENDALI: Just to, just to -- not to double  
16 team, Your Honor, but I will also point out paragraph 3  
17 specifically said that, "ROSS induced LegalEase to engage in  
18 this unlawful activity knowing it violated the terms of  
19 LegalEase's contract with West."

20 THE COURT: Thank you.

21 MR. SIMMONS: Turning to statute of  
22 limitations, the Third Circuit explained in *Methel vs. Gendy*  
23 Co. (phonetic), which is cited in the *Travel Syndication*  
24 case I was mentioning. That because statute of limitations  
25 affirmative defense, under the law of this Circuit, you

1 know, you can only raise it on a Rule 12(b)(6) motion if  
2 it is apparent on the face of the complaint that it should  
3 apply. Otherwise, as in various cases, including Your  
4 Honor's, the defense is best left to a later stage of the  
5 pleading -- of the proceedings.

6 I think that is the better course here because  
7 there are two different issues that come up with plaintiffs'  
8 argument.

9 The first is the choice of law issue that we  
10 didn't hear a lot about this morning, but essentially, you  
11 know, because the statute of limitations, the tortious  
12 interference claim, rather, is found in Minnesota law, it  
13 doesn't, we don't even get into what people knew or when  
14 or the rest of it.

15 When you look at all of the factors, it's  
16 clear that Minnesota law applies, and that would mean that  
17 Delaware's three-year statute of limitations applies.

18 That is true when you look at the place where  
19 the injury occurred. Your Honor held in *Grynberg vs. Total*  
20 that a corporation sustains injuries where it incorporated  
21 or where it had offices. That's a tortious interference  
22 case. And that is West.

23 Now, plaintiff said, oh, maybe it was Thomson  
24 Reuters but the subscriber agreement is with West, so the  
25 only party who they were tortiously interfering with was

1 the West subscriber agreement, and so the harm is all in  
2 Minnesota.

3 That is all that is necessary there. And  
4 because of that, a great weight is placed on where the harm  
5 is placed as opposed to in other cases where there might be  
6 a harm in multiple locations.

7 As to the place where the conduct occurred,  
8 you know, when it's in only one -- when the harm is only in  
9 one state, in other words, because the harm is only in  
10 Minnesota, we don't actually give that much weight to where  
11 the conduct causing it was created. That is the *Eureka vs.*  
12 *Range* which we cited in our brief.

13 And so ROSS raises sort of not out of the  
14 complaint but just sort of raises, oh, well, the conduct  
15 must have occurred in their California office, but that is  
16 not in the complaint so that is not an allegation you can  
17 decide that on.

18 Certainly, all inferences have to go our way,  
19 but what the complaint does allege is there was an illicit  
20 scheme between ROSS and LegalEase, and LegalEase is  
21 incorporated in Michigan. So on this factor, *Twombly* would  
22 suggest that it is not decidable at this stage, so we can  
23 just look to other factors, but in any case it would get  
24 little weight.

25 On the third factor, where the parties are

1 located, yes, ROSS and West are in California and Minnesota,  
2 but they're also incorporated in Minnesota and Delaware.  
3 And so based on their location of incorporation, that would  
4 mean we would apply the Delaware three-year statute of  
5 limitations. Just because ROSS is based in California  
6 doesn't mean that factor wouldn't go our way.

7 THE COURT: Right. Let me interrupt you. You  
8 have got two minutes left. I have two more questions for  
9 you.

10 MR. SIMMONS: Okay.

11 THE COURT: So about Minnesota, is anything  
12 alleged by Minnesota in the complaint other than that is  
13 where West has its principal place of business. That is,  
14 is there anything about the subscriber agreement? Is there  
15 anything about what law governs that? Is any of that in  
16 the complaint?

17 MR. SIMMONS: So the subscriber -- so we do  
18 reference that West is in Minnesota and then discuss, you  
19 know, West in part of the complaint claim. The subscriber  
20 agreement was not attached to the complaint, but it is  
21 incorporated by reference because it discussed -- its terms  
22 are specifically discussed, and the *Runnion* case we cited  
23 in our papers makes clear that when you are discussing a  
24 document, you can consider it in deciding whether a claim  
25 is improperly pleaded.

1                   So from our perspective, that document which  
2                   we attached to our answering brief at 16-1 can come in. It  
3                   says it's a West subscriber agreement and that it is based,  
4                   the law is based in Minnesota.

5                   But Your Honor doesn't need to decide that  
6                   based on the subscriber agreement alone because there is no  
7                   question that for tortious interference claim, the harm is  
8                   sought where West is located. And that is in the complaint  
9                   at paragraph 7.

10                  THE COURT: All right. And if alternatively I  
11                  were to decide that California law applied, Mr. Ramsey was  
12                  citing to I think it was *Endo* decision at end of his earlier  
13                  argument.

14                  Can I decide the discovery rule issue at this  
15                  stage consistent with California law? What is your view on  
16                  that?

17                  MR. SIMMONS: No, you can't, Your Honor. And  
18                  this at least two reasons, I guess maybe even three reasons  
19                  for that.

20                  First, Mr. Ramsey cited to a California state  
21                  court case, and under *Erie*, the pleading rules are actually  
22                  determined by the federal court of law. And so Your Honor's  
23                  decision in *TL of Florida vs. Terex* is a better place to  
24                  look for what needs to be pleaded. And Your Honor  
25                  specifically noted that you frequently can't decide these

1 issues on this motion to dismiss and they're not really  
2 amenable to that.

3 I would also point Your Honor to as *Ausikaitis*  
4 *vs. Kiani* which says, "a plaintiff is not required to plead  
5 sufficient facts so as to avoid affirmative defense based on  
6 the statutes of limitations."

7 So we didn't need to sort of anticipate that  
8 they would bring this claim, certainly not that they would  
9 bring it based on California law. And so Your Honor need  
10 not reach that issue at all on a motion to dismiss, but the  
11 additional reason to not raise it, deal with it now is they  
12 didn't raise the discovery rule issue in their opening  
13 brief. They just sort of raised the statute of limitations,  
14 but they didn't actually discuss the issue of when we  
15 discovered this until we got to reply.

16 And their complaint does not, in any case, say  
17 when we discovered it. At best, there were inferences that  
18 would be we didn't know about it until we -- right before we  
19 sued, certainly within the two-year statute of limitations  
20 window.

21 So I think the better course is either to find  
22 that Minnesota law applies, which Your Honor can certainly  
23 do, and then this is a moot point or, as Your Honor did in  
24 your prior decision in *TL of Florida*, hold off on a statute  
25 of limitations claim until ROSS can develop whatever

1       discovery it thinks it will be able to develop on a statute  
2       of limitations affirmative defense.

3               THE COURT:   Okay.   Thank you.   Plaintiffs' time  
4       is up.

5               We'll turn it back to Mr. Ramsey for his  
6       rebuttal.   Go ahead, please.

7               MR. RAMSEY:   Thank you, Your Honor.   Just a few  
8       final points here.

9               No less than three times, plaintiffs relied on  
10       the *Micro Focus* case in terms of the pleadings standard for  
11       copyright.   One of the requirements there is to allege by  
12       what acts the defendants infringed.

13              Back to my initial comments that there is simply  
14       no allegation of any acts of copying by ROSS or LegalEase of  
15       any of the protectable material.

16              Through plaintiffs' discussion just now, we  
17       heard about key numbers, we heard about headnotes.   Those  
18       are defined terms.   Now we're hearing about algorithms.   I  
19       believe I heard the word "database" involved.   We heard now  
20       for the first time a compilation.

21              This is the point.   There is a lot of material  
22       on the table even through the exposition of argument today  
23       that there is simply no notice in any factual allegation,  
24       direct or from which it can be inferred that any of this  
25       material was actually copied into a ROSS product or by ROSS

1 in general or by LegalEase.

2 In other words, under the language of *Micro*  
3 *Focus*, there is simply no alleged acts that constituted the  
4 infringement. And there is just no notice to the defendant.

5 It's a very large body of material that is  
6 alleged, broader still after today's argument. The point  
7 is plaintiffs needed to specify, to the extent that they  
8 can, and certainly more than they have, what it is that  
9 is the acts by defendants where one may reasonably infer.  
10 Based on some factual allegation, not just boilerplate  
11 recitation of a copyright claim, where that material exists.

12 It is just a fishing expedition with this wide  
13 open conclusory assumption that some material must be in  
14 there somewhere. But that puts the discovery cart before  
15 the pleading horse, and, you know, the complaint frames the  
16 scope of the case.

17 So I think defendants could have done a better  
18 job and should have done a better job at the pleading  
19 standard to allege what acts are alleged to infringe by  
20 defendant and what material could be reasonably referred to  
21 have been copied, and that fails completely here.

22 As to -- you know, and again, plaintiffs cannot  
23 take shelter under the information and belief. I refer the  
24 court to the "network managing solutions vs. AT&T" case.  
25 Only where there is not, and I quote, "some public product

1       that can be reverse engineered is information and belief  
2       appropriate."

3               Plaintiffs could have done more, should have  
4       done more to come up with a specific fact-based theory  
5       directly or upon inference and simply have not done so.

6               Second. On indirect infringement, there is no  
7       way. I'm going to take up than point real briefly.

8               In the opening brief, at page 7, the defendant  
9       alleges that all of the indirect infringement allegations in  
10      the complaint, that is paragraphs 24 through 29, 32 through  
11      35, and 39 -- pardon, 38 through 39 fail because they're  
12      alleged purely on information and belief. No factual content  
13      underlying those allegations that there was knowledge, intent,  
14      an act to induce or contribute to infringement. It's the same  
15      feeling as the direct infringement claim.

16              And in general in the opening brief, for the  
17      same reasons, the defendant alleges and sets forth argument  
18      how there is no -- there is not a factual content to  
19      establish that ROSS actually copied anything, certainly, the  
20      defined material in the complaint, or that LegalEase did.  
21      For those two reasons. Those are the modes in which  
22      defendant took on the indirect infringement claim, filled it  
23      out with some law, but no way was persuaded.

24              There was a question posed in Ms. Cendali's  
25      argument, why would ROSS works with LegalEase if not to

1       infringe? That was a quote that I believe I heard or  
2       something close to that.

3               This is about what you can infer from the  
4       complaint. That is a fair question.

5               Unfortunately for the plaintiffs, in this case  
6       the answer is the only facts in the complaint at all that  
7       characterize or have any, any specificity to fill out ROSS's  
8       product, what is in it, what may or may not have been copied  
9       is the characterization that the product is a "natural  
10      language search." So if we're asking the question why would  
11      ROSS work with LegalEase if not to infringe, well, the  
12      only thing we can infer from the complaint in that sole  
13      characterization is that ROSS is working with LegalEase to  
14      understand "the natural language of judicial opinions."

15              If we're talking about reasonable inferences,  
16      that is all we have on this pleading. And for that reason,  
17      there can be no reasonable inference of copying by ROSS or  
18      LegalEase alike.

19              Finally, I got two minutes left here. I will  
20      turn to tortious interference.

21              In sum, the only way the tortious interference  
22      claim is framed in the complaint, and we heard about three  
23      paragraphs today. I noted them. Paragraphs 1, 3, and 51.  
24      Those are the materials that allegedly form the basis of the  
25      tortious interference claim.

1           In every single one of those, it is simply a  
2 boilerplate recitation of the elements of a tortious  
3 interference claim. That there was a contract that ROSS  
4 knew, that ROSS took some act to interfere with that  
5 contract. Just stating a rule of law again.

6           But again, the pleading standard, as we know  
7 under *Twombly* and *Iqbal* and the more particular cases  
8 dealing with tortious interference requires something more  
9 than that. It has to be -- a claim can't just be a  
10 broad-based hunch and theory and speculation that, gosh,  
11 ROSS might have been in some universe motivated to interfere  
12 with the contract between LegalEase and West. There has to  
13 be some factual material.

14           It may not prove the whole case. That is not  
15 what I'm saying. We're not dealing with strawmen or women  
16 today. It's just some factual material that is beyond just  
17 a recitation of the tortious interference elements, and  
18 unfortunately that is all the plaintiffs have alleged.

19           And for these reasons, plaintiff claims simply,  
20 simply are not sufficient to meet the pleading standard in  
21 this iteration of the complaint for sure.

22           THE COURT: All right. Let me ask you just a  
23 few more questions.

24           We've all talked about Judge Andrews' *Micro*  
25 *Focus* test. Do the defendants have a view on whether I can

1 or should follow his four-part recitation of what it takes  
2 for a claim to survive a motion to dismiss?

3 MR. RAMSEY: I believe it is a fine formulation,  
4 and defendant will accept that formulation.

5 And in particular, candidly, focusing on  
6 defendant's best argument today, to make it clear and not  
7 hide the proverbial ball, Item 4 is the copyright pleading  
8 piece that is really important: By what acts the defendant  
9 infringed the copyright. Here, there is nothing in this  
10 complaint, and that is a requirement, and we're satisfied  
11 adopting that test.

12 THE COURT: All right. With your respect to  
13 your challenge to the indirect infringement allegations,  
14 do you contend that in your opening brief you make some  
15 argument about the sufficiency of the indirect claim  
16 that you did not also make with respect to the direct  
17 infringement claim?

18 MR. RAMSEY: Right. At page 7 of the opening  
19 brief, the defendant asserts that all of the allegations  
20 in the complaint, paragraphs 24 through 29, 32 through 35,  
21 and 38 through 39 fail for failure -- for pleading them on  
22 information and belief without a factual underpinning.

23 Those paragraphs are the bald assertion that  
24 ROSS allegedly knew and intended and induced infringement.  
25 And we stand on our argument. It is a species of the

1 more general genus of argument that pervades the entire  
2 complaint. There is no factual underpinnings for any of the  
3 elements of either copying by ROSS or copying by LegalEase  
4 or knowledge, intent, or control for purposes of indirect  
5 infringement or for tortious interference. Across the  
6 board, that is the flaw, and it was argued in the opening  
7 brief.

8 THE COURT: If I were to require them to file an  
9 amended complaint, what is your position on whether they can  
10 make use of whatever they seem to have learned in the action  
11 against LegalEase? Are you okay with them doing so?

12 MR. RAMSEY: I think that -- well, I'm not  
13 going to concede to that, no. I think that that is not  
14 necessary.

15 The point is they, through that proceeding, they  
16 had awareness of the product. They have known about it for  
17 years. And it's available.

18 So I'm not willing to top the door to, you know,  
19 free-ranging discovery, but I am open to inquiry into the  
20 product that, you know, to be sure there is a link in the  
21 briefs from which anybody can access the service, and  
22 investigate it, test its inputs, its outputs, its features  
23 and functionality, the way that it presents information, the  
24 way it functions. And if there is some piece of that that  
25 could support a claim, then so be it.

1 But it's incumbent to meet the pleadings  
2 standard, in other words, to meet Factor 4 of Judge Andrews'  
3 test, it's incumbent upon the plaintiffs to do that. And  
4 they have just not done so now.

5 THE COURT: If the allegation as I think they  
6 have made very clear at least now is that it was at the  
7 development stage of your client's product that they're  
8 alleging there was copying of their protected content that  
9 is not public. It is not discernible through use of the  
10 product.

11 So how else could they plead about that or, you  
12 know, get information about it without information and  
13 belief allegations followed by discovery?

14 MR. RAMSEY: I submit it is knowable, at least  
15 inferentially from the reverse engineering. Just like in  
16 the patent cases. I don't mean to keep referring to patent  
17 cases, but in a technical case like this, it's no different.  
18 It's true in every patent case, much like the copyright case  
19 here, that the plaintiff can't know everything about a  
20 product, but in the words of *Network Managing Solution*,  
21 where there is "some public product that can be reverse  
22 engineered" to shore up at least inferentially some more  
23 specific features than, hey, this is a search product, it  
24 must be in there somewhere. Well, the same is true here.  
25 And we're only asking you to apply in an evenhanded way the

1 rules on pleading information and belief and the rules about  
2 alleging specific acts.

3 There has to be -- we're not saying prove the  
4 whole case. We're realistic. What we're saying, there must  
5 be something to put the defendants on notice. This is not  
6 just about meeting the pleading standard because it is  
7 stated in a case someplace. It is about allowing the  
8 defendant to say, ah, we now understand more specific ways  
9 of parameters of the theory in the claim. We can formulate  
10 a defense, admit or deny, and we'll frame the scope of  
11 discovery.

12 So, more is possible without sitting in the lab  
13 at ROSS through the investigation of the product just like  
14 other IP cases, and something more is required here. They  
15 can do more.

16 THE COURT: All right. Just one more question.  
17 I'm not in any way offended by your reference to patent  
18 cases. My question actually relates to that.

19 In patent cases, we usually have infringement  
20 contentions at a fairly early stage in the discovery  
21 process. Isn't that part of the answer here? They will  
22 be required, if they survive this motion to dismiss, to, in  
23 a fairly expeditious manner that we would build into the  
24 schedule, serve something like infringement contentions on  
25 you that make clear, here is what we contend is protectable

1       about, you know, our intellectual property, and here is what  
2       we contend you copied.

3               What would be inadequate from your perspective  
4       with that approach?

5               MR. RAMSEY: Well, broadly, there is nothing  
6       offensive about such an approach and that sort of mechanism  
7       is useful, of course, in any sort of litigation.

8               But my point is we're not quite there yet, Your  
9       Honor. We're still at the pleadings stage. The pleadings  
10      rules do require some level of specificity to open the doors  
11      of discovery at all.

12              And plaintiffs have plenty of resources to avail  
13      themselves to set the framing of this case beyond we have  
14      databases and algorithms and headnotes and key numbers and  
15      compilations and something in some way, somehow must be in  
16      their product, but we're not, we're not going to frame it in  
17      any sort of even, in any inferential way that is useful to  
18      frame our case.

19              There is more work to be done in the complaint,  
20      I would submit, Your Honor, before we get to the kind of  
21      case management details like that. We're not at that point  
22      yet, and the pleadings standards exist for a reason, I would  
23      submit.

24              THE COURT: Okay. Thank you very much. I want  
25      to thank all three of you for the very helpful argument.

1 I'm going to take the motion under advisement.  
2 If I need anything further from you, I will let you know. I  
3 hope everybody enjoys the weekend. Happy Halloween, I  
4 suppose, and stay safe.

5 Thank you again. We will be in recess.

6 (The attorneys respond, "Thank you, Your Honor.")

7 (Telephonic argument ends at 12:48 p.m.)

8

9 I hereby certify the foregoing is a true and accurate  
10 transcript from my stenographic notes in the proceeding.

11

/s/ Brian P. Gaffigan  
Official Court Reporter  
U.S. District Court

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